Whose Responsible For Financial Responsibility?

NC Court Holds Liability Policy for Commercial Vehicle Automatically Provides Minimum of $750,000 of Coverage, Despite Owner Request For Lesser Coverage.

James W. Bryan and Daniel W. Koenig

Owners and insurers of commercial vehicles in North Carolina are in store for some major changes in the way they obtain and provide liability coverage, unless a recent decision of the North Carolina Court of Appeals is reversed by the North Carolina Supreme Court. In a case presenting an issue of first impression, the North Carolina Court of Appeals recently ruled that every insurance policy providing liability coverage for a commercial vehicle in North Carolina automatically provides at least $750,000 of liability insurance coverage, regardless of whether a lesser amount of coverage was requested, paid for, and specifically set forth on the face of the policy. Thus, even if the owner of a commercial vehicle is using a liability insurance policy as just a part of a coverage plan that may include a primary liability insurance policy, an excess or umbrella policy, a financial security bond, a financial security deposit of money or securities, or a self-insurance program, every liability insurance policy will now have read into it, as a matter of law, at least $750,000 of liability coverage. The case is *North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Terry Davis Armwood, Jr. et al,* 638 S.E.2d 922 (N.C. App. 2007), which is now on appeal before the North Carolina Supreme Court based on a strong dissent by Judge Robert C. "Bob" Hunter of the Court of Appeals. The Trucking Industry Defense Association (TIDA), the Property Casualty Insurers Association of America (PCIAA), the American Insurance Association (AIA), and the North Carolina Association of Defense Attorneys (NCADA) have all submitted amicus curiae briefs requesting that the Court of Appeals be reversed and that the Supreme Court adopt the dissenting opinion of Judge Hunter.

If upheld, the ramifications of the holding of the North Carolina Court of Appeals will be significant, and will have a major impact on insurers, their agents, and their insureds who own and utilize commercial motor vehicles in North Carolina. TIDA, PCIAA, AIA, and NCADA expressed similar concerns to the North Carolina Supreme Court about the impact of the Court of Appeal's decision. In addition to being contrary to the plain language of the statutes at issue, upon which both insurers and owners of commercial vehicles have rightly relied in developing coverage programs, the Court's holding, among other things, (1) effectively precludes insurers from issuing, and owners of commercial vehicles from obtaining, liability insurance policies on commercial vehicles in North Carolina for less than $750,000, (2) eliminates the flexibility afforded to owners of commercial vehicles to satisfy the financial responsibility requirements by means other than a single liability insurance policy, (3) will limit the number of liability insurers writing coverage for commercial motor vehicles at a $750,000 policy limit (or up to $5 mil. limit), and (4) will result in higher insurance premiums for owners of commercial vehicles.

The Insured Did Not Want, and Specifically Rejected, A Policy Providing $750,000 of Liability Coverage.

Farm Bureau's insured, Mr. Best, purchased a 30-passenger bus and sought liability coverage from Farm Bureau. Farm Bureau offered Mr. Best a policy with liability coverage of $750,000 per accident. However, Mr. Best refused this amount of coverage and requested and received a policy with liability coverage of $50,000 per person and $100,000 per accident. Mr. Best used the bus to transport passengers to church at no charge, but, unknown to Farm Bureau, Mr. Best on occasion charged for the use of his bus. Several months after the policy was issued, eight-year-old T.J. Armwood was injured when he exited the bus as directed by Mr. Best and was struck by a car.

T.J. and his parents filed a claim with Farm Bureau and Farm Bureau offered the limits of its policy ($50,000) to settle the claim against its insured. The Armwoods demanded an amount in excess of the policy limits, so Farm Bureau filed a declaratory judgment action to determine the scope and amount of coverage provided under its policy. The Armwoods sought to have the policy reformed to provide $5,000,000 of coverage based on 19A N.C.A.C. 03D.801 and 49 C.F.R. 387.9, or, alternatively, $750,000 pursuant to N.C. Gen. Stat. § 20-309(a)(1). At summary judgment, the trial court reformed Farm Bureau's policy to reflect coverage of $750,000. The Court of Appeals affirmed.

Burden Seemed Squarely Placed on Commercial Vehicle Owners to Satisfy Financial Responsibility Requirements.

One likely reason why this issue had not been addressed previously by any appellate court in North Carolina is that the statutes at issue are, at least they seemed to be, fairly clear. The primary statute at issue, N.C. Gen. Stat. § 20-309(a1), provides:

> An *owner* of a commercial motor vehicle, as defined in G.S. 20-4.01(3d), shall have financial responsibility for the operation of the motor vehicle in an amount equal to that required for for-hire carriers transporting nonhazardous property in interstate or foreign commerce in 49 C.F.R. § 387.9.

(emphasis added). This statute clearly places responsibility on the *owner* of a commercial vehicle to maintain the required financial responsibility for the operation of the commercial vehicle. That the onus for maintaining such coverage was placed on the owner of a commercial vehicle, as opposed to the insurer, seemed to be reinforced by the very distinct language of the North Carolina statute requiring that *every liability insurance policy* for a motor vehicle, which would include a commercial vehicle, provide specified minimum levels of liability insurance coverage. N.C. Gen. Stat. § 20-279.21(b)(2) *requires* that every "motor vehicle liability *policy*":

> *Shall insure* the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles…against loss from the liability imposed by law for damages arising out of the ownership,

> maintenance or use of such motor vehicle or motor vehicles…subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars ($60,000) because of bodily injury to or death of two or more persons in any one accident, and twenty-five thousand dollars ($25,000) because of injury to or destruction of property of others in any one accident[.]

(emphasis added). As Judge Hunter pointed out in his dissent, "[t]he plain language of the statute itself [§ 20-279.21(b)(2)] actually inserts these specific amounts [$30,000/$60,000/$25,000] into every policy as a matter of law." 638 S.E.2d at 927 (J. Hunter, dissenting). The case law of North Carolina has recognized this to be the case on numerous occasions. However, this language is very different from the language selected by the legislature in N.C. Gen. Stat. § 20-309(a1), which "by its plain language puts the onus on *owners* to maintain required liability insurance on their vehicles[.]" *Id.* at 926 (J. Hunter, dissenting) (emphasis in original). Farm Bureau's policy satisfied, and in fact exceeded, the specific requirements of § 20-279.21(b)(2), by providing liability coverage of $50,000/$100,000/$25,000.

"Spirit and Purpose" Prevail Over Statutory Language – Court Concludes Burden is on Neither the Insurer Nor the Owner of a Commercial Vehicle.

Despite the plain statutory language in § 20-309(a1) that "[a]n owner of a commercial motor vehicle … shall have financial responsibility for the operation of the motor vehicle[,]" the Court of Appeals concluded that "the owner is not responsible for ensuring that the insurance policy contains the minimum liability coverage imposed by statute." 638 S.E.2d at 924. The majority further opined that § 20-309(a1) "does not place a burden on either party [the insurer or the owner of a commercial vehicle] to ensure that liability coverage meets the minimum statutory requirements, but it inserts the provisions of § 20-309(a1), as a matter of law, into every insurance policy issued for not-for-hire commercial vehicles." *Id.* at 925. It is important to note that nowhere in § 20-309(a1) does the statute purport to apply only to not-for-hire commercial vehicles.

Nevertheless, the Court of Appeals concluded that "because § 20-279.21 and § 20-309 have an identical purpose – protecting the innocent from irresponsible drivers – it is proper that these statutes are interpreted in a consistent manner in order to give effect to the intent and purpose of the Legislature." 638 S.E.2d at 925. Therefore, the Court held that "just as provisions of N.C. Gen. Stat. § 20-279.21 are read into every insurance policy as a matter of law, provisions of N.C. Gen. Stat. § 20-309(a1) are also read into every insurance policy as a matter of law." *Id.*

As noted by Judge Hunter in his dissent, "the legislature's purpose in creating these Acts was clearly to protect the public by having higher mandatory minimum liability insurance coverage for commercial vehicles because the potential for damage to property and individuals is higher." 638 S.E.2d at 926 (J. Hunter, dissenting). However, Judge Hunter

further observed that "the legislature addressed that concern by putting the onus for obtaining adequate coverage on the owner." *Id.* Clearly, there is a significant difference between $30,000/$60,000/$25,000 and a combined single limit of at least $750,000. However, to require every liability insurance policy issued on a commercial vehicle to provide $750,000 of coverage (or up to $5 mil. for other commercial motor vehicles per 49 C.F.R. 387.9 and 387.33) would have the effect of limiting the number of insurers able to issue policies with such high liability limits and it would result in higher premiums charged by those insurers for the owners of commercial vehicles. Thus, the North Carolina legislature declined to write such high limits into every insurance policy issued for commercial vehicles, but opted to put in place punitive measures to encourage owners to maintain the higher limits of coverage required by the statute. *See, e.g.*, N.C. Gen. Stat. §§ 20-313(a) and 20-313.1.

Section § 20-313(a) is within the same Article as § 20-309(a1) and makes it a misdemeanor for "any *owner* of a motor vehicle registered or required to be registered in this State who shall operate or permit such motor vehicle to be operated in this State without having in full force and effect the financial responsibility required by this Article[.]" *See* N.C. Gen. Stat. § 20-313(a) (emphasis added). Section 20-313.1, also in the same Article, makes it a misdemeanor for "[a]ny *owner* of a motor vehicle registered or to be registered in this State who shall make a false certification concerning his financial responsibility for the operation of such motor vehicle[.]" N.C. Gen. Stat. § 20-313.1 (emphasis added). These two statutory provisions clearly have a punitive element to them and provide an *owner* of a commercial vehicle with great incentive to comply. Based on the majority's holding, if the $750,000 coverage requirements are written into every insurance policy as a matter of law, an owner would not ever be subject to criminal prosecution and the misdemeanor provisions would be rendered meaningless.

Decision Greatly Limits Flexibility Previously Thought Available to Commercial Vehicle Owners.

Judge Hunter recognized that multiple methods for securing adequate liability insurance policies may be utilized by an owner of a commercial vehicle to satisfy the financial responsibility requirements. A classic example is an owner having a primary policy and excess policy to satisfy the obligation. Excess coverage is often cheaper than primary coverage. Utilizing other methods permitted by the financial responsibility statutes (i.e., a financial security bond, a financial security deposit of money or securities, or a self-insurance program) in various combinations might also be in the financial best interests of commercial vehicle owners. Sections 20-279.21(j), 62-268 (which applies to certain for-hire motor carriers operating in intrastate commerce), as well as 49 U.S.C. § 31138(c)(3), specifically contemplate the use of more than one liability policy to satisfy the financial responsibility requirements. The result of the Court's ruling is to allow the policies of more than one insurance carrier to satisfy the requirements of § 20-279.21(b)(2) in the amount of $30,000/$60,000/$25,000 while forbidding the use of the policies of more than one insurance carrier (such as a primary insurer and excess insurer) to satisfy the requirements for commercial vehicles in the amount of at least $750,000.

The flexible approach implicitly adopted by the legislature – as opposed to the majority's approach requiring every insurance policy issued for a commercial vehicle to provide at least $750,000 of liability coverage – serves to keep insurance premiums lower than they would be otherwise. Greater competition in the insurance marketplace means lower premiums. The more options available to owners of commercial vehicles to meet the insurance requirements, and the more insurance carriers available to provide the required coverage (or even just part of the required coverage), the easier it will be for owners of commercial vehicles to comply with the requirements of § 20-309(a1).

Conclusion

If the ruling stands, every liability insurance policy providing liability coverage for commercial vehicles in North Carolina will, as a matter of law, provide at least $750,000 of such coverage. In addition, owners of commercial vehicles will not have the flexibility of using a policy or policies with lower limits or otherwise satisfying their financial responsibility requirements, because *every* liability insurance policy covering a commercial vehicle will provide automatically the minimum of $750,000 of coverage under North Carolina law. Hopefully, the North Carolina Supreme Court with agree with Judge Hunter's dissent, as well as the positions of TIDA, PCIAA, AIA, NCADA, and, of course, Farm Bureau, that it was error to reform Farm Bureau's policy to reflect $750,000 in liability coverage, and that Farm Bureau's insured, Mr. Best, "had no obligation to purchase his entire minimum coverage from one insurer, and plaintiff had no obligation to issue a policy for the statutory minimum[.]" 638 S.E.2d at 928 (J. Hunter, dissenting).

Stay tuned!

James W. Bryan and Daniel W. Koenig are with the Greensboro office of the firm Nexsen Pruet Adams Kleemeier, PLLC. Jim and Dan both practice in the areas of transportation and insurance litigation and are members of DRI's Trucking Law and Insurance Law Committees. Jim and Dan prepared the amicus curiae brief on behalf of the Trucking Industry Defense Association in the case discussed in this article. They can be reached at jbryan@nexsenpruet.com and dkoenig@nexsenpruet.com.